Wilson presented neither of these issues to the Fifth Circuit Court of Appeals, nor did the Fifth Circuit or the district court, *sua sponte*, rule upon them. This Court should reject the Petition for this threshold failure by Wilson to give the Fifth Circuit a fair opportunity to consider the issues of law that he now so strenuously asserts.

In his appeal to the Fifth Circuit, the issue that most closely parallels the one Wilson now champions, was stated as follows: "Whether the United States District Court's factual finding that the plaintiff did not believe he had been discriminated against even though he complained of such discrimination is supported by the record and sufficient to take the case away from the jury and grant a Judgment as a matter of law." The issue, Wilson argued, was his *belief that the wrongful conduct had occurred*, not whether a belief that something was illegal (when, in fact, it was not) could support an opposition clause claim.

In support of this issue, Wilson relied almost entirely upon the 1981 case of *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), a case which stands for the fairly mundane proposition that "an employee who engages in opposition activity should not be required to act at his own peril if it turns out that no unlawful *employment activity* actually exists, as long as the employee holds a reasonable belief that the unlawful *employment practices* do exist." *Payne*, 654 F.2d at 1139 (emphasis added). The Fifth Circuit carefully considered Wilson's argument, as had the district court before it, and distinguished *Payne*, and its application to Wilson's appeal.

> *Payne* involved an employee who believed the employer was engaged in an actual unlawful practice, even while in fact, the employer may not have been so engaged. This Court held in *Payne* that it was not fatal to the plaintiff's retaliation case that he failed to prove that the employer was actually discriminating against blacks in retail store employment opportunities. *Id.* at 1137.
>
> *Payne* does not involve an employee who believes that an employer is engaged in an unlawful practice although that practice is not actually unlawful, ***which is the situation here. The practice of which Wilson complained, that Roberts was unqualified and was hired because of an affair, is not a practice made unlawful by Title VII.*** (Emphasis added.)

Fifth Circuit Opinion at 6a, Appx. to Wilson's Petition.

The Fifth Circuit continued by addressing precisely the issue Wilson had raised, and responding to his assertion that the jury should have played a role in the trial:

> Whether Wilson believed to the contrary [that is, that paramour favoritism, standing alone, somehow constituted sex discrimination] is immaterial. Even if his allegation that Roberts obtained the position because of her affair were [sic] correct, such 'paramour favoritism' is not an unlawful employment practice under Title VII, because 'the fact that [Wilson] may have been terminated for complaining about favorable treatment received by [Roberts] is unrelated to [Wilson's] gender'. [internal citation omitted.] Because it is settled law in this Circuit that such paramour favoritism does not run afoul of Title VII, Wilson's alleged

> belief to the contrary could not have been reasonable.

Id. at 6a-7a.

Wilson now seeks to involve this Court by arguing issues never raised below, never considered, and never addressed by the Fifth Circuit. He leaves the *Payne* analysis, and defaults to an argument of timing, asking this Court to grant certiorari based on faulty assumptions of unsettled law – but assumptions that were not, in any case, ever presented to the courts below for consideration.

Although parties are not limited to the precise arguments made below, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), this Court has also indicated that it would only hear those "new" issues when it believed that the Circuit below "understood the tenor of the argument." *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000). *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question[, it] was not raised in the Court of Appeals and is not properly before us."). It cannot be said that the Fifth Circuit understood the tenor of Wilson's argument now presented to this Court. It simply was not made.

II. The Law Was Settled by 2001 That Paramour Favoritism Does Not Violate Title VII.

For the first time, Wilson contends that the lower courts stripped him of protection to which he otherwise was entitled under section 704(a) upon a showing that he reasonably believed paramour favoritism was unlawful under Title VII. He now argues that the law as to paramour favoritism was unsettled prior to the 2003 decision

in *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003) or the 2002 decision in *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 656 n.6 (5th Cir. 2002), and that, therefore, he reasonably could have believed that such favoritism was unlawful. Thus, he contends, his alleged opposition in 2001 should be protected under section 704(a). Aside from Wilson's failure to properly present this argument below, the argument lacks merit, as the "debate" surrounding paramour favoritism was settled by 2001.

First, there is an important difference between paramour favoritism and sexual harassment that *includes* paramour favoritism. Wilson never alleged that he or any other employee was subjected to a hostile work environment or that some other employee demanded sexual favors as a *quid pro quo* from any subordinate employee, to Wilson's detriment. The proposition that *preferential treatment of a paramour without other indicators of actionable harassment does not constitute sexual discrimination* was not novel when Wilson met with President Potter in 2001. *See* Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 Wash. & Lee L. Rev. 547, 559 (1994) ("[A]lmost all courts considering the sexual favoritism issue have . . . reject[ed] the idea that Title VII forbids sexual favoritism as such.").

More to the point of Wilson's newfound argument, over a decade before, in 1990, the EEOC, under the direction of then-Chairman Clarence Thomas, adopted the view set forth by the Second Circuit in *DeCintio v. Westchester County*

Medical Center, 807 F.2d 304, 308 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987)[1] that not all types of sexual favoritism violate Title VII, and issued a policy guidance stating that paramour favoritism, in the absence of other factors establishing the existence of sexual harassment, did not violate Title VII. Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, No. 915.048, 1990 WL 1104702 (January 12, 1990). The EEOC reasoned that neither a male nor a female employee could show that he or she had been treated less favorably than another employee of the opposite sex based solely on the fact that a supervisor treated a paramour more favorably. *Id.* The EEOC acknowledged that situations involving sexual relationships between employees and supervisors *could* give rise to Title VII liability if the sexual relationship were coerced or necessary for a member of a particular sex to obtain an employment benefit. *Id.* at *2. The EEOC further stated that widespread favoritism based on granting of sexual favors also might be tantamount to a hostile work environment. *Id.* at *3 ("In these circumstances, a message is implicitly conveyed that managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."). Petitioner, however, alleged neither of the latter two potential violations in his meeting with President Potter.

Since 1990 (but before 2001), most, if not all, lower courts considering the issue have followed *DeCintio* and the EEOC Policy Guidance. *See, e.g.*, *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998); *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997);

---

[1] Wilson failed to point out that the Second Circuit in *DeCintio* overruled the district court opinion upon which he relies in his Petition.

Becerra v. Dalton, 94 F.3d 145, 150 (4th Cir. 1996); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353-54 (7th Cir. 1995); *Piech v. Arthur Anderson & Co, S.C.*, 841 F. Supp. 825, 829-30 (N.D. Ill. 1994); *Thomson v. Olson*, 866 F. Supp. 1267, 1272 (D.N.D. 1994), *aff'd*, 56 F.3d 69 (8th Cir. 1995); *Candelore v. Clark County Sanitation Dist.*, 752 F. Supp. 956, 960-61 (D. Nev. 1990), *aff'd*, 975 F.2d 588 (9th Cir. 1992) (rejecting claims based on both Title VII and the ADEA). The state of the law with regard to paramour favoritism is – and was in 2001 – firmly settled.

In fact, even the Fifth Circuit's rejection of paramour favoritism claims did not begin with *Ackel* or *Green*, as Wilson implies. In 1995, the Fifth Circuit discussed the issue for the first time in *Ellert v. University of Texas, at Dallas*, 52 F.3d 543 (5th Cir. 1995). In *Ellert*, a female employee entered the office of her supervisor and saw the supervisor embracing another female employee. *Id.* at 544. After plaintiff was terminated, she alleged that her termination was "solely because of her discovery of the indiscretion." *Id.* The court cited section 1604.11(g), *DeCintio*, and *Candelore* in noting that claims related to a supervisor's voluntary sexual relationship with a subordinate had "not been widely accepted." *Id.* at 546. The court affirmed the grant of summary judgment to the defendant, holding that "[e]ven if [the plaintiff's] knowledge of the affair was the true *animus* behind the discharge decision, it was a motivation that did not rely upon her gender and, as such, it was not within the ambit of Title VII's protections." *Id.* (emphasis in original).

Before *Ackel* and *Green*, courts frequently cited *Ellert* in concluding that paramour favoritism was not a form of discrimination prohibited under Title VII. *See Taken*, 125

F.3d at 1370; *Buenrostro v. Flight Safety Intern., Inc.*, No. CIV.A.SA-99-CA0819FB, 2001 WL 674171, at *6 (W.D. Tex. March 2, 2001), *aff'd in part*, 62 Fed. Appx. 556, 2003 WL 1202768 (5th Cir. (Tex.)), Feb. 25, 2003; *Lopez v. Four Seasons Nursing Ctrs., Inc.*, No. CIV.A.SA-99CA07690G, 2000 WL 33348796, at *10 (W.D. Tex. December 13, 2000); *Harvey v. Chevron U.S.A., Inc.*, 961 F. Supp. 1017, 1029 (S.D. Tex. 1997); *Boyd v. Runyon*, No. 94-1557-JTM, 1996 WL 294330, at *3 (D. Kan. May 23, 1996); *Proksel v. Gattis*, 49 Cal. Rptr. 2d 322, 324 (Cal. Ct. App. 1996). It can hardly be said, then, that *Ackel*, or even *Green*, was the genesis of the law on paramour favoritism in the Fifth Circuit.

III. This Case Is Not an Appropriate Vehicle for Addressing the Questions Presented.

Wilson asserts that his case presents an appropriate vehicle for resolution of issues he presents. However, even if this Court were to hear the merits of this case, rule in Wilson's favor, and remand the case for further proceedings, there is no record evidence upon which the lower courts could determine that Wilson reasonably believed the content of his conversation with President Potter was protected activity under section 704(a). Furthermore, by Wilson's own admission, the impulsive and unfounded accusations he claims caused the elimination of his position are not the sort of important exchanges of views between employees and employers he now claims are at stake in this case. Finally, as determined by the trial court, the decision to eliminate Wilson's position was far down the track before Wilson ever stepped into President Potter's office. Therefore, even if this Court finds merit in

the issues presented in the Petition, this case is not an appropriate vehicle through which to consider them.

As Wilson points out, an employee is entitled to protection under section 704(a) for opposition activity based on a reasonable belief that the employer is engaged in unlawful employment practices. *See, e.g., Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). Wilson argues that he believed he was complaining about perceived sex discrimination. However, his testimony at trial establishes that his comments to President Potter about an alleged relationship between Drs. Roberts and Morganti did *not* amount to opposition of practices he perceived to be discriminatory.

There is nothing in the record to support Wilson's assertion that he "reasonably believed" Dr. Roberts obtained the CIPO position because of an alleged affair she was having with Dr. Morganti. Wilson himself acknowledged that he had no proof that Dr. Roberts was having an affair with Dr. Morganti. He said: "It's all hearsay, it's all rumor, but she was." Later when asked what proof he had that they [Drs. Roberts and Morganti] were having an affair, he replied, "None." Surely such testimony based on rank rumor and gossip does not provide the proper foundation for Wilson to claim that he "reasonably believed" the University's selection of Dr. Roberts for the CIPO position was a violation of Title VII and that his complaints to President Potter were protected activity.

Wilson never intended to complain about sex discrimination, nor did he think that he was complaining about sex discrimination. Wilson admits he did not contest

the process through which Dr. Roberts was promoted to the CIPO position. Trial Transcript, at 60 (Wilson). He never told President Potter that he considered himself more qualified for Dr. Roberts' position or that he had even been interested in becoming the CIPO himself. *Id.* at 60-61. He presented no evidence to President Potter of the alleged affair or of any resulting discrimination. Rather, he admits that he became frustrated when the meeting did not go as he wanted and, in anger, accused two high-ranking university officials of an inappropriate sexual relationship. President Potter could not have understood such a complaint as anything more than a personal grievance – *not* as a complaint about alleged sex discrimination. *Id.* at 38 (Wilson). *See Alack v. Beau Rivage Resorts, Inc.*, 286 F. Supp. 2d 771, 775 (S.D. Miss. 2003) ("[T]he 'wide range' of protected activity [under the opposition clause] does not include those situations where the opposition relates not to unlawful employment practices but to a personal grievance.") (quoting *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 559 (D. Kan. 1995)). While an employee is not required to register opposition to allegedly unlawful practices with "the clarity or precision of lawyers," an employee's statement must be clear enough for an employer to discern that the employee opposes an allegedly unlawful employment practice. *Alack*, 286 F. Supp. 2d at 774-75. Wilson's outburst plainly failed to meet this minimum threshold of clarity.

Even if this Court should determine that Wilson's complaints to President Potter rise to the level of protected opposition activity and remand this case, his retaliation claim will still fail for lack of a causal connection between his complaints and the elimination of his position. The

district court made this finding in its Order Granting Judgment as a Matter of Law:

> The testimony is uncontradicted that Dr. Roberts had agreed to merge the two departments and eliminate Dr. Wilson's job title before Dr. Wilson had the conference with Dr. Potter. Since Dr. Wilson did not engage in protected activity, this matter is irrelevant; but even if the conversation had been protected action, the defendants have shown that the decision to merge the two departments had been made prior to the conference.

Order Granting Judgment as Matter of Law at 10a, Appx. to Wilson's Petition.

This case is not an appropriate vehicle through which this Court should consider the Questions Presented.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Certiorari.

THIS, the 17th day of January, 2006.

Respectfully submitted,

DELTA STATE UNIVERSITY, ET AL.

J. CAL MAYO, JR.
(Mississippi Bar No. 8492)
Counsel of Record

MARY ANN CONNELL
(Mississippi Bar No. 6460)
POPE S. MALLETTE
(Mississippi Bar No. 9836)
Attorneys for Respondents

Of Counsel:

MAYO MALLETTE PLLC
428 North Lamar Boulevard
Post Office Box 1456
Oxford, Mississippi 38655
Telephone: (662) 236-0055
Facsimile: (662) 236-0035

(3)

No. 05-610

FILED
FEB 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

WILLIAM HARRY WILSON,

Petitioner,

v.

DELTA STATE UNIVERSITY, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

DENNIS L. HORN*
SHIRLEY PAYNE
HORN & PAYNE, PLLC
P. O. Box 2754
Madison, MS 39130-2754
(601) 853-6090

ERIC SCHNAPPER
School of Law
University of Washington
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

ARGUMENT 1

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTIONS PRESENTED 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES:

Ackel v. Nat'l Communications, Inc., 339 F.3d 376 (5th Cir. 2003) 4

Boyd v. Runyon, 1996 WL 294330 (D.Kan. 1996) 5

Byers v. Dallas Morning News, Inc., 209 F.3d 419 (5th Cir. 2000) 3

Cartagena v. Aegis Mortgage Corp., 275 F.3d 346 (4th Cir. 2001) 3

DeAnda v. St. Joseph Hospital, 671 F.2d 850 (5th Cir. 1982) 3

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 6

Ellert v. University of Texas, 52 F.3d 543 (5th Cir. 1995) 4, 5

Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002) 3, 4

King v. Palmer, 778 F.2d 878 (D.C.Cir. 1985) 4, 5

Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996) 3

TABLE OF AUTHORITIES – Continued

Page

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) 2, 3

Randel v. U.S. Dept. of Navy, 157 F.3d 392 (5th Cir. 1998) 3

Thibodeau v. CLECO Utility Group, 68 Fed. Appx. 711 (5th Cir. 2004) 3

Toscano v. Nimmo, 570 F. Supp. 1197 (D.Del. 1983) 4, 5

ARGUMENT

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTIONS PRESENTED

Respondents do not dispute the existence or importance of the inter-circuit conflict described in the Petition. They argue only that the instant case is not an appropriate vehicle for resolving the Questions Presented. Respondents' arguments are unsound, and in certain respects rest on an incorrect characterization of the proceedings below.

Respondents incorrectly assert that the only relevant issue raised by petitioner in the Fifth Circuit was whether petitioner *in fact* believed he had been discriminated against.[1] To the contrary, petitioner expressly raised below the very issue underlying the petition, whether as a matter of law Title VII protects from retaliation an employee who reasonably but mistakenly believes that the actions he or she opposes constitute unlawful discrimination.

In his brief in the court of appeals, petitioner asserted that the district court erred in "finding as a matter of law [that] Dr. Wilson was not protected from retaliation

---

[1] Br. Opp. 6:

> In his appeal to the Fifth Circuit, the issue that most closely parallels the one Wilson now champions, was stated as follows: "Whether the United States District Court's factual finding that the plaintiff did not believe he had been discriminated against even though he complained of such discrimination is supported by the record and sufficient to take the case away from the jury and grant a Judgment as a matter of law."

because he reported 'paramour' not sex discrimination.'"[2] The argument advanced by petitioner below is the same as the contention raised by the petition, that "Dr. Wilson's good faith belief that he had been discriminated against because of sex will sustain his retaliation claim, regardless of any paramour argument."[3] "An employee who engages in opposition activity should not be required to act a[t] his own peril if it turns out that no unlawful activity actually exists, so long as the employee holds a reasonable belief that the unlawful employment practices do exist."[4]

The district court had held that petitioner's actions were not protected from retaliation because there was no "gender discrimination for the simple reason that such treatment discriminates not only against men but also against all other women." (Pet. App. 9a).[5] That holding, petitioner argued in the court of appeals, was inconsistent with Eleventh Circuit precedent under which a plaintiff alleging retaliation did not have to demonstrate that unlawful discrimination had actually occurred; all that was required was a showing that the plaintiff had a "reasonable belief" that the employer had engaged in unlawful discrimination.[6] Petitioner invoked the leading Fifth Circuit case adopting the reasonable belief rule,

---

[2] Brief for Appellant, p. 17.

[3] Brief for Appellant, p. 18.

[4] Brief for Appellant, pp. 18-19 (*quoting Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981)).

[5] Respondents suggests that the district court "distinguished *Payne*." (Br. Opp. 6). To the contrary, the district court made no mention of *Payne* and made no mention of the reasonable belief rule.

[6] Brief for Appellant, pp. 17-21.

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981).

Prior Fifth Circuit decisions applying the reasonable belief rule had not recognized an exception for cases in which the retaliation victim had made an error of law (the actions complained of were not unlawful) as opposed to an error of fact (the actions complained of had not occurred.)[7] That particular question had not been specifically addressed by the Fifth Circuit prior to the instant case. Petitioner urged the Fifth Circuit to apply the reasonable belief rule to errors of law, but the Fifth Circuit refused. Respondents are correct when they state that "[t]he Fifth Circuit carefully considered Wilson's [reliance on *Payne*] and distinguished *Payne*."[8] That disputed holding is precisely the basis of the questions presented.

Respondents incorrectly assert that in the court of appeals petitioner conceded that the favoritism he complained of was legal under Title VII, and that petitioner never contended that "he reasonably could have believed that such favoritism was unlawful."[9] To the contrary, in

---

[7] The Fifth Circuit in the years following *Payne* had repeatedly held that employees are protected from retaliation when they complained with a "reasonable belief" that there had been a violation of Title VII, even though that belief may have been mistaken. *Thibodeau v. CLECO Utility Group*, 68 Fed. Appx. 711, 714 (5th Cir. 2004); *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642, 657 (5th Cir. 2002); *Cartagena v. Aegis Mortgage Corp.*, 275 F.3d 346 (4th Cir. 2001); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000); *Randel v. U.S. Dept. of Navy*, 157 F.3d 392, 394 (5th Cir. 1998); *Long v. Eastfield College*, 88 F.3d 300, 305 (5th Cir. 1996); *DeAnda v. St. Joseph Hospital*, 671 F.2d 850, 853 n.2 (5th Cir. 1982).

[8] Br. Opp. 6.

[9] Br. Opp. 8-9.

the Fifth Circuit petitioner argued expressly that under the circumstances of this case paramour favoritism was indeed *un*lawful under Title VII.

> In those cases in which Title VII was extended to allow recovery based upon a supervisor's voluntary sexual relationship with a subordinate, the claims usually were premised upon the paramour receiving some form of preferential treatment over the claimant. See *King v. Palmer*, . . . 778 F.2d 878 (D.C.Cir. 1985) (implicit recognition of Title VII action alleging discrimination due to favored treatment of paramour); *Toscano v. Nimmo*, 570 F.Supp. 1197 (D.Del. 1983) (supervisor's grant of promotion to lover over plaintiff sufficient to predicate liability under Title VII).[10]

In its 2005 decision in the instant case the Fifth Circuit held that this issue had been resolved to the contrary in its 2003 decision in *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003), and its 2002 decision in *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002); but the court below did not even suggest that the Fifth Circuit had yet addressed this issue in 2001, when petitioner complained to his employer and was dismissed.

Respondents note that in 1995 the Fifth Circuit had referred to the problem of paramours in *Ellert v. University of Texas*, 52 F.3d 543 (5th Cir. 1995),[11] a decision never mentioned by the court of appeals. Respondents observe that some lower courts (but not the Fifth Circuit) had "cited *Ellert*" in holding that paramour favoritism was

---

[10] Brief for Appellant, pp. 20-21.

[11] Br. Opp. 11.

lawful.[12] But respondents do not contend in this Court that *Ellert* had decided in 1995 that paramour favoritism was legal under Title VII, and they advanced no such argument in the courts below.[13]

Respondents now suggest that by 2001 the legality of paramour favoritism had been resolved by decisions *outside* the Fifth Circuit.[14] But in the proceedings below respondents never contended,[15] and the Fifth Circuit clearly did not hold, that the reasonableness of petitioner's complaint would be controlled by non-Fifth Circuit precedent. The existence of a 1990 EEOC Policy Guidance – also cited by respondents for the first time in this Court

---

[12] Br. Opp. 11. To the contrary, in one of the cases referred to by respondents, *Ellert* is actually described as holding that paramour favoritism *is* unlawful under Title VII. *Boyd v. Runyon*, 1996 WL 294330 *3 (D.Kan. 1996).

[13] The actual issue in *Ellert* was only whether Title VII protected a worker from dismissal because she had *knowledge* of (but had never objected to) a supervisor's affair. 52 F.3d at 546-47. *Ellert* expressly noted that there was legal authority for the proposition that favoritism for a paramour (as opposed to merely having a paramour) violates Title VII. 52 F.3d at 546:

> In those cases in which Title VII was extended to allow recovery based upon a supervisor's voluntary sexual relationship with a subordinate, the claims usually were premised upon the paramour receiving some form of preferential treatment over the claimant. In the instant case, however, Ellert does not allege that the assistant received preferential treatment over her because of the existence of a sexual relationship with the Dean.

(Footnote omitted). The footnote cited *King v. Palmer* and *Toscano v. Nimmo*, 52 F.3d at 546 n.12, the very cases relied on by petitioner in the court below in the instant case.

[14] Br. Opp. 9-11.

[15] In their brief in the Fifth Circuit, respondents did not rely on any of the eight non-Fifth Circuit cases now cited in their Brief in Opposition.

– assuredly did not conclusively establish the meaning of Title VII in the Fifth Circuit, any more than it does in this Court. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-69 (1991) (rejecting interpretation of Title VII in EEOC Policy Guidance).

The decision of the Fifth Circuit below rests solely on the questions of law set forth in the Questions Presented. Respondents argue that this case is not an appropriate vehicle for deciding those issues because, even if petitioner prevails on those legal issues, respondents on remand may later prevail at trial.[10] At this point in the proceedings, however, the only issue decided by the court of appeals, and before this Court, is whether the allegations of the petitioner – if true – are actionable as a matter of law. Respondents' predictions regarding the ultimate resolution of the factual disputes in this case are not relevant at this juncture. Whatever argument respondents wish to advance regarding the evidence offered by respondents and petitioner is a matter to be dealt with only on remand.

---

[10] Br. Opp. 12:

> [E]ven if this Court were to hear the merits of this case, rule in Wilson's favor, and *remand* the case for further proceedings, there is no record evidence upon which the lower courts could [then] determine that Wilson reasonably believed the content of his conversation . . . was protected activity.

(Emphasis added). Br. Opp. 14:

> Even if this Court should determine that Wilson's complaints . . . rise to the level of protected opposition activity and *remand* this case, his retaliation claim *will* still fail for lack of a causal connection between his complaints and the elimination of the position.

(Emphasis added).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DENNIS L. HORN*
SHIRLEY PAYNE
HORN & PAYNE, PLLC
P.O. Box 2754
Madison, MS 39130-2754
(601) 853-6090

ERIC SCHNAPPER
School of Law
University of Washington
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*